Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1994

Appeal PA-010277-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to: "All records and correspondence during the last two years about trial delays because of a shortage of judges."

The Ministry identified 29 responsive records, and provided the requester with full access to 20 of them and partial access to three others. Access to the remaining records or partial records was denied on the basis of one or more of the following exemptions contained in the *Act*:

- section 13(1) (advice or recommendations)
- section 19 (solicitor-client privilege)
- section 21(1) (invasion of privacy)

The Ministry also denied access to the undisclosed portions of Record 29 on the basis that it consisted of non-responsive information.

The requester, now the appellant, appealed the Ministry's decision.

During mediation the appellant agreed not to pursue access to the information the Ministry claimed was non-responsive in Record 29, and to all information that was withheld under section 21(1). Accordingly only Records 1-3 and the undisclosed portions of Records 23 and 26 remain at issue in this appeal. Section 13(1) has been claimed for all of these records, and section 19 has been identified as an additional exemption claim for Records 1-3.

Further mediation was not successful, and the appeal proceeded to the adjudication stage. I sent a Notice of Inquiry to the Ministry initially, and received representations in response. I then sent the Notice and the Ministry's representations to the appellant, who also provided representations.

RECORDS:

Records 1-3 comprise a memorandum from the Director of Crown Operations in the Toronto Region to the Attorney General on the issue of trial delays in that Region.

Records 23 and 26 are the first pages of two 3-page "House Book Notes" on the topic of the appointment of bilingual judges. The response section of both Notes has been withheld and the remaining portions have been disclosed to the appellant.

DISCUSSION:

Solicitor Client Privilege

The Ministry has claimed section 19 of the *Act* only for Records 1-3.

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

The Ministry states:

> The Ministry submits that [the records qualify] for an exemption pursuant to section 19 of the *Act* regarding solicitor client privilege. The Ministry additionally claims that the privilege attached to these records has not been waived. The record was authored by counsel in the Ministry and it was addressed to the Minister. … It is a confidential internal legal memorandum.

The Ministry then reviews a number of previous orders which upheld the solicitor-client exemption claim for certain types of records, and refers to what it describes as the four criteria of the common law solicitor-client communications privilege set out in Order M-394:

1. there must be a written or oral communication;
2. the communication must be of a confidential nature;
3. the communication must be between a client (or his agent) and a legal adviser; and
4. the communication must be directly related to seeking, formulating or giving legal advice.

The Ministry submits:

> The record in question is a written confidential memorandum regarding trial delay prepared by counsel, who is also a senior manager in the Criminal Law Division, for the purpose of briefing and providing legal advice to the Minister. The record offers a legal opinion, regarding trial delays, legal advice, and recommendations regarding steps to be taken in relation to the issue. Accordingly, it is the Ministry's position that all of the above criteria have been met and this record is covered by solicitor-client privilege and is exempt pursuant to section 19 of the *Act*.

Elsewhere in its representations, the Ministry states that Records 1-3 were prepared by the Director "solely for the purpose of advising the Minister in relation to the business of the Ministry."

Solicitor-client communication privilege has been described in a number of different ways, including by the four criteria referred to by the Ministry. However, in my view, Adjudicator Holly Big Canoe in Order P-1551 outlines the most appropriate characterization of this privilege. As she states in that order, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this

privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.

A number of courts have described solicitor-client communication privilege.

The Supreme Court of Canada in *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618 described the privilege as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [See Order P-1409]

The English Court of Appeal found that the privilege applies to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has also been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

In assessing whether or not a record qualifies for exemption under solicitor-client communication privilege, I must be satisfied that the communication was made for the dominant purpose of seeking or providing legal advice [See *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.); *Ontario (Attorney General) v. Hale* (1995), 85 O.C.A. 229 (Div Ct.); *Descôteaux*, *supra*; and Orders PO-1663 and MO-1205).

The Director of Crown Operations for the Toronto Region prepared Records 1-3. The Ministry refers to this individual as "counsel", and also as a "senior manager" in the Criminal Law Division. Although I have not been provided with information concerning the qualifications of the position of "Director of Crown Operations", given the nature of the role, I assume it would require the incumbent to be a lawyer. In any event, the Ministry has stated that the particular individual holding this position at the time the memorandum was prepared was a lawyer, and I accept that. Also, based on the Ministry's representations, I find that the memorandum was prepared by the Director and communicated in writing to the Attorney General with a reasonably-held expectation of confidence.

However, in my view, the fact that the Director of Crown Operations is a lawyer is itself not sufficient to establish that all communications made by the Director qualify for solicitor-client communication privilege. In order to meet the requirements of this exemption claim, I must also be satisfied that the communication was either made for the purpose of providing legal advice, or was part of the "continuum of communications" described by the court in *Balabel*.

The Ministry of the Attorney General is somewhat unique in its structure and functions. In discharging its responsibilities for the administration of the provincial justice system, the Ministry must and does employ a large number of lawyers who provide a wide range of legal services. In some cases, of which the Director of Crown Operations is a good example, individual lawyers employed by the Ministry are required to perform a combination of responsibilities, both legal and operational. I have no difficulty in accepting that the Criminal Law Division as a whole, which includes a regionalized "Crown Operations" structure, has as its primary responsibility the provision of legal services to the province's criminal court system. However, it is important to recognize that this Division (as well as others in the Ministry) is also responsible for a range of operational responsibilities, similar in nature to other operational divisions that exist throughout the various ministries of the Ontario Government. It is the managers who discharge these operational responsibilities and, in my view, not all advice provided by management staff in the various Divisions of the Ministry of the Attorney General is necessarily or inherently legal advice protected by solicitor-client privilege. One must look to the nature of the advice itself, and distinguish between legal advice that warrants specific treatment in accordance with the common law requirements of solicitor-client privilege, and operational advice that should be considered under section 13(1) of the *Act* in the same manner that similar types of advice is handled in other institutions.

Applying this approach to Records 1-3, I find that any advice contained in the memorandum from the Director of Crown Operations to the Attorney General was operational and not legal in nature. The subject matter of the memorandum is trial delays, and the summary, analysis, explanations, advice and recommendations provided by the Director deal directly with this operational issue. I have also turned my mind to the question of whether, despite the fact that the memorandum does not contain legal advice, it might be part of a "continuum of communications" involving a solicitor and client. Based on the representations provided by the Ministry, and my independent assessment of the content of Records 1-3, I am not persuaded that the requirements of a "continuum of communications" outlined in *Balabel* are present. The memorandum would appear to be an issue-specific response to the Minister on the matter of trial delay in Toronto, provided by the particular manager responsible for this operational issue.

Absent evidence to the contrary, I am not persuaded that the memorandum is part of any continuum of communications that would relate to legal advisory functions provided by the Director to the Attorney General in other contexts.

Alternatively, even if it could be argued that the contents of some portions of the memorandum constitute legal advice, I find that any such advice would not be the dominant purpose of the communication between the Director and the Attorney General. Clearly, in my view, the dominant, if not exclusive, purpose of any advice contained in Records 1-3 is operational and not legal in nature.

I find support for my findings in a number of authorities. In dealing with the scope of solicitor-client privilege, Justice Farley of the Ontario Court (General Division) stated as follows in *Confederation Treasury Services Ltd. (Re),* [1997] O.J. No. 3598:

> … I would also note that [solicitor client] privilege does not automatically come into play merely because a lawyer is engaged by a client. The privilege attaches to the request for and obtaining of legal advice. **It does not attach to communications between a client and his retained counsel when that counsel is either not acting as a lawyer or where it is not legal advice but rather some other form of advice or other assistance being offered**. [my emphasis]

British Columbia Information and Privacy Commissioner David Loukidelis also considered a similar issue in his Order No. 331-1999, which involved the application of solicitor-client privilege under the comparable provisions of the British Columbia statute. In that order Commissioner Loukidelis had to determine whether certain communications from a lawyer (who was acting as an investigator), were privileged solicitor-client communications. After finding that the institution had failed to establish the existence of a solicitor-client relationship, Commissioner Loukidelis went on to state:

> Even if one assumes that the Board [the institution in that case] was in a solicitor-client relationship with the investigating lawyer, I find that the Board has not established that the records in question were confidential communications for the purpose of giving or seeking legal advice within such a relationship. The courts have, in a number of cases, held that, even if a solicitor and client relationship exists, the lawyer must be acting as a lawyer and must be providing legal advice before the communication in question can be privileged.
>
> For example, in *Northwest Mettech Corp. v. Metcon Services Ltd.*, [1996] B.C.J. No. 1915, Master Joyce ruled that communications from a lawyer to his client were not privileged because the lawyer, who was also a patent agent, was acting as a patent agent rather than as a lawyer with respect to those communications. A solicitor-client relationship existed between the lawyer and his client, but that was not enough. Master Joyce cited both Canadian and U.S. authorities for the proposition that communications between a lawyer and his or her client, in order to be privileged, must concern legal advice or representation. See, for example,

the United States District Court decision in *Hercules Incorporated v. Exxon Corporation* (1977) 434 Fed. Supp. 136 (at p. 147):

> If the primary purpose of a communication is to solicit or render advice on non-legal matters, the communication is not within the scope of the attorney-client privilege. Only if the attorney is 'acting as a lawyer' - giving advice with respect to the legal implications of a proposed course of conduct - may the privilege be properly invoked. In addition, if a communication is made primarily for the purpose of soliciting legal advice, an incidental request for business advice does not vitiate the attorney-client privilege.

It appears that an appeal from the decision of Master Joyce was dismissed by Smith J. of the British Columbia Supreme Court. (This is alluded to in the judgment of Thackray J., on another aspect of the same case, in *Northwest Mettech Corp. v. Metcon Services Ltd.*, [1997] B.C.J. No. 2734.)

It might be argued that *Northwest Mettech* involved a special case, namely individuals who are both lawyers and patent agents and are assisting a client in obtaining or in otherwise dealing with a patent. I do not agree. In my view, the reasoning and result in *Northwest Mettech* are simply consistent with other cases, such as *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), which require the disputed communication to be for the purpose of giving or seeking legal advice before it will be privileged.

In summary, I find that the communications reflected in Records 1-3 were made for the purpose, or alternately for the dominant purpose, of providing operational advice to the Minister on issues relating to trial delays in the Toronto Region, rather than for the purpose or dominant purpose of providing legal advice. As such, the requirements of solicitor-client communications privilege have not been established, and Records 1-3 do not qualify for exemption under section 19 of the *Act*.

Advice and Recommendations

The Ministry claims section 13(1) of the *Act* as the basis for denying access to all of the records that remain at issue. Section 13(1) reads:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The "advice or recommendations" exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making (Orders 94 and M-847). In addition, information in records that would "reveal" the advice or recommendations is also exempt from disclosure under section 13(1), even though it is not itself advisory in nature, if disclosure of that information would permit the drawing of

accurate inferences as to the nature of the advice and recommendations (Orders P-233, M-280 and P-1054).

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission)* v. *Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations)* v. *Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

Records 23 and 26

The Ministry submits:

> These records contain advice and/or recommendations that pertain to the submission of a suggested course of action that will ultimately be accepted or rejected during the deliberative process.
>
> The records describe a possible course of action in that they contain recommendations and options to be considered by the Minister and/or senior management of the Ministry in discussions with other parties on the appointment of bilingual judges.
>
> There is factual and background information that could permit the drawing of accurate inferences as to the nature of the actual advice or recommendations given to the government [P-233].

I do not accept the Ministry's position.

The undisclosed portions of Records 23 and 26 consist of suggested responses that the Attorney General might consider in fielding questions in the Legislative Assembly in January of 1999 related to the appointment of bilingual judges. I considered a similar issue in Order PO-1678, where I stated:

> Record 39 and the remaining portions of Record 22 are "House Book notes". … I accept that the "Response" sections of these records contain information provided by staff as to the manner in which the Ministers should respond to questions on this issue. However, in my view, these records do not contain "advice" or "recommendations" in the sense contemplated by section 13(1). The information is provided to the Ministers for the specific purpose of making it available to the public if called upon to do so as part of open legislative debate. For this reason, I find that the "Response" portion of Records 22 and 39 would

> not reveal advice or recommendations of a public servant and, accordingly, it does not qualify for exemption under section 13(1) of the *Act*. …

Adjudicator Laurel Cropley applied this analysis in Order PO-1848-F, where she found:

> In my view, this reasoning [in Order PO-1678] is similarly applicable in the current appeal. It is apparent, from the records themselves and the Ministry's representations, that the information that has been withheld from Records 15 and 19 was intended to be used by the Minister or senior management in responding to public queries on this issue or as part of open legislative debate. Accordingly, I find that the withheld portions of Records 15 and 19 would not reveal the advice or recommendations of a public servant within the meaning of section 13(1), and they are not exempt under this section. …

Similarly in this appeal, the information severed from Records 23 and 26 was prepared and provided to the Attorney General for the specific purpose of making it available to the public if called upon to do so as part of open legislative debate. As such, I find that disclosure of the "Response" portions of pages 23 and 26 would not reveal advice or recommendations and, therefore, they do not qualify for exemption under section 13(1) of the *Act*.

The Ministry has not claimed any other exemptions for Records 23 and 26, so they should be disclosed to the appellant.

Records 1-3

As stated earlier, Records 1-3 comprise a 3-page memorandum prepared by the Director of Crown Operations and sent to the Attorney General concerning trial delays in the Toronto Region. In applying section 13(1) to this memorandum, the Ministry submits:

> [The records were] prepared and compiled by counsel for the Ministry, who is also a senior manager, solely for the purpose of advising the Minister in relation to the business of the Ministry. The document contains the factual information upon which legal advice or recommendations to the Minister are based. It contains legal opinion and analysis and contains specific advice and recommended courses of action for the Minister's consideration relating to trial delays. Disclosure of this confidential legal memorandum would inhibit the free-flow of advice or recommendations within the deliberative process of government decision-making. It could reasonably be expected to have a chilling effect upon Crown counsel in the creation of written documents containing legal analysis and advice. The disclosure of this memo would not only reveal advice to government, it would also have a negative impact on the ability of the government to receive free-flowing legal and policy advice and recommendations regarding this issue and other issues in the future.

The Ministry then supports it position by referring to four previous orders of this office in which the section 13(1) exemption claims for the records was upheld (Orders P-771, P-946, P-1037 and

P-1102). In reviewing those orders, I note that the section 13(1) exemption claim was upheld only for certain portions of the records at issue in those appeals.

As the Ministry states in its representations, the memorandum that comprises Records 1-3 deals with the subject of trial delays. The author begins the memorandum by summarizing the state of affairs in the Toronto Region in October of 2000 (when the record was prepared), and goes on to offer explanations, analysis and specific recommendations.

Having reviewed the memorandum, I am satisfied that the specific recommendations and the final sentence in the "analysis" section on Record 3 fall within the scope of section 13(1). Although, as stated earlier, I do not accept that the memorandum contains legal advice, I do accept that these portions of Record 3 consist of or would reveal suggested courses of action put forward by the Director of Crown Operations as the manager of the Toronto Region, which would be accepted or rejected by the Attorney General during the deliberative process of addressing trial delays. Accordingly, they qualify for exemption under section 13(1) of the *Act* and should not be disclosed.

However, I find that the rest of the memorandum, consisting of Records 1 and 2 and the remaining portions of Record 3, do not qualify for exemption under section 13(1). The summary, explanations and first sentence in the "analysis" section do not contain, nor would their disclosure reveal, "advice or recommendations" as this office has interpreted these terms. In my view, the information contained in the summary section of Records 1 and 2 and the first sentence of the "analysis" of Record 3 are clearly factual in nature, consisting of statistical information concerning various aspects of court operations and the impact they are having on case inventories. I find that this information falls within the scope of the exception provided by section 13(2)(a) of the *Act*, which reads:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;

Similarly, I find that the various explanations contained in Records 2 and 3 consist of factually based conclusions reached by the Director of Crown Operations regarding the operation of the courts in his Region. Although these conclusions apparently formed the basis of the advice and recommendations that follow, in my view, they do not themselves represent "advice" and clearly not "recommendations".

As far as whether disclosure would reveal advice or recommendations, the Ministry submits:

> It is the Ministry's position that it is inappropriate to sever the express advice and recommendations from the factual basis upon which they were based and provided to the Minister. To do so would, in effect reveal the advice and recommendations made. The factual information cannot reasonably be severed from the advice and recommendations in the present case, as they are legal observations intertwined with the factual assertions.

Having reviewed the content of the records, I do not accept the Ministry's position. In my view, if the specific advice and recommendations were severed from Record 3, it would not be otherwise disclosed or revealed by providing the appellant with access to the remaining portions of the 3-page memorandum. I accept that care must be exercised in applying the section 13(1) exemption claim to ensure that disclosure would not reveal properly exempt information but, in my view, this can be achieved in the specific circumstances of this appeal through the severing of Record 3 and the disclosure of all remaining information in the memorandum.

Accordingly, I find that the final sentence in the "analysis" portion of Record 3 and the specific recommendations that follow qualify for exemption under section 13(1), and that the remaining portion of Record 3 and all of Records 1 and 2 do not qualify for exemption under this provision.

ORDER:

1. I uphold the Ministry's decision to deny access to the portions of Record 3 containing the specific recommendations, as well as the last sentence in the "analysis" portion of the record.

2. I order the Ministry to disclose Records 1 and 2, the undisclosed portions of Records 23 and 26, and the portions of Record 3 not covered by Provision 1 of this order to the appellant by **March 21, 2002**.

3. In order to verify compliance with Provision 2, I reserve the right to require the Ministry to provide me with a copy of the records and parts of records, which are disclosed, to the appellant.

Original signed by: February 28, 2002
Tom Mitchinson
Assistant Commissioner